SC92314

IN THE SUPREME COURT OF MISSOURI

AMERICAN AIRLINES, INC.,

Appellant,

vs.

DIRECTOR OF REVENUE,

Respondent.

On Petition for Review From
The Administrative Hearing Commission,
The Honorable Sreenivasa Rao Dandamudi, Commissioner

RESPONDENT'S BRIEF

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ATTORNEYS FOR DIRECTOR OF REVENUE

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STATEMENT OF FACTS

American Airlines ("American") sold fuel to Trans-States Airlines, Inc. ("Trans-States") and Chautauqua Airlines, Inc. ("Chautauqua") from October 1, 2004 through September 30, 2007. Legal File ("LF") 25. American now seeks a tax refund from the Missouri Department of Revenue ("Department") in the amount of $5,179,361.62 plus statutory interest based on the premise that the fuel sales to these separate companies were not actually "sale[s] at retail." LF 26, 28-29.

American provides flights out of St. Louis for its customers. LF 21-22. In order to expand its customer base, American entered into contracts with Trans-States and Chautauqua airlines. Both Trans-States and Chautauqua agreed to provide regional airline connections under the brand name "AmericanConnection" for American flights out of St. Louis. LF 21. Chautauqua and Trans-States provided these flights as independent contractors. LF 3-4. They bore all risks associate with their business and were liable for their own activities and costs. LF 4. For AmericanConnection flights, American required that the independent airlines use approved brands, colors and designs on all signage, uniforms and promotional materials in the course of promoting and providing the flights. LF 22, 24. American also provided the tickets and ticketing services. LF 24. Outside of

these parameters, however, Chautauqua and Trans-States controlled their businesses and the planes on their own.

The Air Services Agreements ("Contracts") between American and the independent airlines specified the compensation structure and cost allocations between the parties. Chautauqua and Trans-States received compensation on a "block hour" basis. LF 27-28, 143, 297-306. A block hour is defined as "that time when an aircraft moves under its own power for the purpose of flight and ends when the aircraft comes to rest after landing." LF 85, 245. The block hour compensation structures assumed a fuel price of $0.85 in the Chautauqua contract and $1.05 in the Trans-States contract. LF 143, 304. When the price of fuel exceeded these fixed prices, American compensated the independent airlines for the price difference on a monthly basis. *Id.*

American disclaimed any responsibility for providing fuel for the AmericanConnection planes in the Contracts. LF 97-98, 259-260. As such, Chautauqua and Trans-States could purchase their fuel from any source. The clauses in the Contracts regarding the fuel provision did not substantively change at any time between 2001 when the Contracts became active and 2007 when American stopped remitting sales tax on the sale of fuel to these independent airlines. Within the Contracts, the independent

airlines agreed to allow American to bid on the fuel provision services and agreed to accept American's bid if competitively priced. LF 98, 259.

On October 1, 2004 Chautauqua and Trans-States began purchasing fuel services from American. LF 25. The price at which American could provide fuel to Chautauqua and Trans-States was much lower than the price at which the independent airlines could purchase it from other suppliers, as American sold them the fuel at the bulk rate American paid for the fuel used in their own planes. LF 26. American entered into oral contracts with Chautauqua and Trans-States that specified that the American fuel was only to be used in connection with AmericanConnection flights and planes. LF 25, 27. Outside of this restriction, American retained no right of use or ownership of the fuel.

Once Chautauqua and Trans-States obtained the fuel, they exerted sole control over the fuel. American did not control the pilots who flew the AmericanConnection flights. LF 103, 186. American also had no control over the efficiency standards of the planes. *Id.* Nothing in the oral contracts prohibited the independent airlines from using the fuel in connection with general maintenance or inspection of the AmericanConnection planes. American's only influence over the fuel was the sales condition restricting its use to AmericanConnection flights. LF 27. Chautauqua and Trans-States bore the financial risk of fuel loss under the Contracts. LF 143, 304. The

independent airlines were not compensated by American for fuel used outside of the course of block hours. *Id.*

Acting according to the oral contracts, American directed ConocoPhillips and Sunoco, their fuel suppliers, to provide fuel for AmericanConnection planes. LF 25. American then charged Chautauqua and Trans-States for the full price of the fuel deposited into the AmericanConnection planes. LF 26. Chautauqua and Trans-States proceeded to pay the full cost of the fuel supplied by American. *Id.* On a monthly basis, American reimbursed Chautauqua and Trans-States for the price of the fuel above the assumed prices set out in the Contracts. LF 143, 304. Between October 1, 2004 and September 30, 2007, American charged Chautauqua and Trans-States for tax on their fuel purchases. LF 27. On a monthly basis, American reimbursed the airlines for the fuel taxes, as required under the Contracts. LF 143, 304.

In 2007 American came to the conclusion that as the entity bearing some of the cost of the fuel and all of the fuel taxes, the taxes ultimately paid by American should fall within the provisions of § 144.805, RSMo (2011 Cum. Supp.).[1/] LF 25. Under § 144.805, American did not have to pay taxes on jet

[1/] All citations to the Revised Statutes of Missouri will be to the 2011 Cumulative Supplement unless otherwise noted.

fuel above a yearly statutory cap of $1,500,000. *Id.* Each year, after American reached the statutory cap of $1,500,000, they produced an exemption certificate that freed them from fuel taxes for the remainder of the year. *Id.* American reached this statutory cap in every year between 2004 and 2007. *Id.* American now contends that no "sale at retail" took place in the fuel sales between American and the independent airlines.

American has had their tax refund claim reviewed and denied twice. On March 20, 2008, the Director of Revenue denied the claim and American subsequently appealed the denial to the Administrative Hearing Commission ("Commission"). LF 485-486. On January 6, 2012 the Commission denied the complaint, finding as a matter of fact that the fuel sales constituted "sales at retail." LF 12.

SUMMARY OF ARGUMENT

American Airlines' contention that no sale at retail took place ignores the basic terms of the Contracts that governed its relationship with the independent airlines Chautauqua and Trans-States. Every time the independent airlines received fuel they exerted dominion and control over the fuel. The independent airlines not only controlled the pilots in charge of flying the planes, but they also controlled the use of the fuel for maintenance purposes when the planes were not flying AmericanConnection routes. The contracts governing the relationships between American and the independent airlines do not give one control over the other, particularly for fuel services.

A sale at retail took place when the independent airlines purchased the fuel, placing the jet fuel outside of American's dominion and control. Dominion and control is the essence of ownership, and where ownership is transferred between two business entities the transaction is subject to taxation. While the sale of the fuel was conditioned on the independent airlines' agreement to use the fuel for AmericanConnection flights and not other flights, this condition did not inhibit the transfer of title or ownership. Indeed, under § 144.010.1(10), a sale can be "conditional." The independent airlines had the right to use the fuel in any way they desired that did not violate the conditional term.

The Contracts between the parties also indicate that American did not intend to maintain title or ownership of the fuel (until American changed its mind to pursue a tax advantage). Multiple provisions of the contracts explicitly state that American had no obligations in relation to fuel or fuel services. American did not have to provide, oversee, or manage the fuel transactions in any way. Their only obligation was to pay a portion of the fuel cost as outlined in the Contracts. Another contract provision gave American the right to bid on contracts to provide fuel and fuel services to the independent airlines. This provision indicates that if American provided fuel services, it would be treated like any other third party contractor. Certainly third party contractors could not retain title or ownership of the fuel sold to the independent airlines. Therefore, American could not retain this right.

American sold fuel to the independent airlines Chautauqua and Trans-States in a basic business transaction. The only notable part of this sale was the condition that the fuel not be used for flights other than AmericanConnection flights. This condition on the use of the fuel has no bearing on which party owned the fuel after the transaction took place. The independent airlines paid for the fuel and the process by which the transfer took place indicates that all parties intended the independent airlines to hold title and ownership of the fuel. Accordingly, the Administrative Hearing Commission should be affirmed.

ARGUMENT

Standard of Review

American has the burden of proving that the fuel sales in this case do not constitute "sales at retail" subject to sales tax. § 144.210.1. In interpreting the evidence, exemptions from taxes should be strictly construed against American. *See Southwestern Bell Telephone Co. v. Dir. of Revenue*, 182 S.W.3d 226, 228 (Mo. banc 2005). The statutory provision capping jet fuel tax at $1.5 million constitutes an exemption and should be strictly construed against American. § 144.805.1.

The Administrative Hearing Commission ("Commission") had a duty to review the Director of Revenue's actions, make factual findings, and apply existing tax law to the facts of the American dispute. *J.C. Nichols Co. v. Dir. of Revenue*, 796 S.W.2d 16, 20-21 (Mo. banc 1990). The Court should defer to the Commission's findings of fact, as long as there is substantial evidence to support the findings. *Allcorn v. Tap Enterprises, Inc.*, 277 S.W.3d 823, 827 (Mo. App. S.D. 2009); *Southwestern Bell Telephone*, 182 S.W.3d at 228. Questions of law are reviewed *de novo*. *Id.*

I. American Sold Fuel to the Independent Airlines Chautauqua and Trans-States, Transferring Title and Ownership, and Destroying American's Right to Exert Dominion and Control Over the Fuel – Responding to Appellant's Sole Point.

American transferred title and ownership of the jet fuel to Chautauqua and Trans-States (the independent airlines) when American deposited the fuel into the planes and the independent airlines paid American. The independent airlines controlled when and how they used the fuel. This control existed independent of American's terms of sale for the jet fuel. As American had no authority to control the specific use, storage or consumption of the fuel, they held neither title nor ownership.

American contends that by placing conditions on the fuel sales they avoided transferring title and ownership. They also assert that a cost allocation provision in the Contracts meant that neither Chautauqua nor Trans-States ever purchased the fuel in a sale. These arguments do not address the legal standards for ownership and must fail. The party with the right to use, store and consume a good has dominion and control of the property. *Kansas City Power and Light Co. v. Dir. of Revenue*, 83 S.W.3d 548, 551 (Mo. banc 2002). The key to holding title and ownership is having the right to assert dominion and control over a good. *Olin Corp v. Dir. of*

Revenue, 945 S.W.2d 442, 444 (Mo. banc 1997). By paying American for the fuel, the independent airlines acquired the right to exercise dominion and control over the fuel in any way they chose that was not explicitly prohibited by the terms of the sale.

A. A "sale at retail" occurs where there is a transfer of title or ownership of a good between two parties.

Missouri charges a tax on sales of jet fuel that are "sales at retail." § 144.805.1; § 144.010.1(11). "Sale at retail" is statutorily defined as:

> [A]ny transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration[.]

§ 144.010.1(11). In order to meet the statutory requirements of § 144.010.1(11), a transfer must be a "sale" and constitute a "business" transaction. A "sale," as defined in § 144.010.1(10) encompasses "any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for valuable consideration." § 144.010.1(10) (emphasis added).

A "business" transaction, for the purposes of a "sale at retail," is defined in turn as "any activity engaged in by any person…with the object of gain, benefit, or advantage, either direct or indirect." § 144.010.1(2) (emphasis added). Under these parameters, a sale does not even have to involve any monetary exchange. In fact, no party is required to receive any financial benefit in order for the exchange to be subject to taxation. The statute requires only that, in order to constitute a "business" transaction, the party engaging in an exchange benefit from the transaction in some way. *Kansas City Aviation Dept. v. Dir. of Revenue*, 314 S.W.3d 343, 346 (Mo. banc 2010). Benefit to the seller creates sufficient consideration to make a sales contract valid. *State ex. inf. Miller v. St. Louis Union Trust Co.,* 74 S.W.2d 348, 354-55 (Mo. banc 1934). Where a beneficial exchange happens in a sale at retail, the transaction is subject to taxation under § 144.010.1.

"Ownership of, or title to" property is held by the individual or entity with the right to exercise "dominion or control" over the property. *Olin Corp*, 945 S.W.2d at 444. Holding dominion or control necessitates that the party be able to exert some independent control over the disposition of the property. *Id.* A party can exert dominion and control over property, however, without having complete license to do as they wish with the property and without holding the entire "bundle of rights" associated with the property. *State ex*

rel. Thompson-Stearns-Roger v. Schaffner, 489 S.W.2d 207, 215 (Mo. banc 1973) (overruled on other grounds).

A transfer of "the right to use, store or consume [property]" constitutes a sale at retail. *Kansas City Power and Light Co.*, 83 S.W.3d at 551. These rights embody key facets of the dominion and control standard. However, the right to use, store or consume does not have to exist independent of oversight. For example, a hotel guest has the right to use, store or consume electricity while staying in a hotel. *Id.* This right constitutes a transfer of title or ownership of the electricity sufficient to qualify as a "sale at retail" for taxation purposes. *Id.*

The Missouri legislature specifically accounted for the possibility of "conditional" transfer or exchange when drafting § 144.010.1(10). After the completion of the sale the seller has no right to restrict the buyer's behavior in connection with the good beyond the specific conditions of the sale. *Municipal Acceptance Corp. v. Canole*, 119 S.W.2d 820, 824 (Mo. banc 1938). The seller also cannot retain title for himself. *Id.* The lack of control by the seller means that the buyer has achieved dominion and control over the good despite the existence of continuing conditions on the good's use. *Id.* As conditions do not preclude the occurrence of a "sale," conditions also cannot inhibit the government's ability to collect a tax on the sale. *Id.*

The key to establishing title or ownership over a good is acquiring dominion and control over the property. *Olin Corp*, 945 S.W.2d at 444. This dominion and control is generally manifested through use, storage and consumption of the good. *Kansas City Power and Light Co.*, 83 S.W.3d at 551. By selling the jet fuel to the independent airlines American transferred the right to use, store and consume the fuel to Chautauqua and Trans-States. The transfer of the right to exercise dominion and control constituted a sale at retail subject to taxation in Missouri.

B. The independent airlines exercised dominion and control over the jet fuel after American sold the fuel.

The Commission concluded as a matter of fact that American engaged in "sale[s] at retail" when they sold fuel to Chautauqua and Trans-States. L.F. 12, 54. And the facts support the Commission's conclusion. The Commission explained that these independent airlines not only held possession of the fuel, but also exercised dominion and control which is "the essence of ownership." LF 12. This Court should, therefore, defer to the Commission's finding that the transfer was a sale at retail. *Allcorn*, 277 S.W.3d at 827.

A prerequisite to performing a sale at retail is being engaged in a business transaction. While American may not have profited directly off of the sale of the fuel to Chautauqua and Trans-States, American engaged in

the transaction "with the object of gain, benefit, or advantage." § 144.010.1(2). And a "gain, benefit, or advantage" can be "either direct or indirect." *Id.* Under the terms of the Contracts, American had to compensate Chautauqua and Trans-States for fuel expenditures only above $0.85 and $1.05, respectively. LF 143, 304. This provision meant that American directly benefitted from paying low fuel prices. American entered into the fuel contracts with the independent airlines in order to decrease the price of the fuel American had to reimburse. The ultimate financial savings constituted a "gain, benefit, or advantage" sufficient to qualify the sale as a business transaction under § 144.010.1(2); LF 16.

American concedes in its brief that whichever party has "the right to control the use or disposition of the property" holds ownership and title. Appellant's Opening Brief at 13. The Contracts specifically state that American did *not* have the right to control the disposition of the property and that American had "no obligations or duties with respect to…fueling." LF 97, 259. Furthermore, the independent airlines' possession of the jet fuel is prima facie evidence of their ownership of the fuel. *Glass v. Allied Van Lines, Inc.*, 450 S.W.2d 217, 220 (Mo. App. S.D. 1970). American gave up their right of control over the fuel when the fuel was deposited by third-party suppliers into the planes, putting the fuel under the control of Chautauqua and Trans-States.

American contends that the independent airlines could not exercise dominion and control over the fuel as a result of the stringent conditions of the sale and parameters of the AmericanConnection Contracts. This argument, however, fails to acknowledge the bargaining that occurred prior to the sale. In agreeing to purchase fuel from American, the independent airlines agreed to purchase fuel that was, per the conditions, incapable of flying planes other than for AmericanConnection flights. The independent airlines bargained for the terms of the sale knowing that the fuel came subject to the conditions of the oral contract. Despite these conditions, the independent airlines agreed to purchase the fuel instead of going to another source. The existence of conditions does not retain title for the seller. *Municipal Acceptance Corp.*, 119 S.W.2d at 824.

Once the fuel was in the planes and paid for, the independent airlines had complete control over the practical disposition of the fuel. Thus, the Commission found that "being contractually obligated to perform American connection flights in a specific manner…[was] not equivalent to being subject to American's discretionary control." LF 14. The independent airlines controlled the pilots who flew the planes and the efficiency standards and corporate expectations of the pilots. LF 103, 186. The independent airlines certainly had the freedom to hire pilots who had tendencies to use up more or less fuel than typically required. The independent airlines could have

certainly wasted a portion of the fuel with no contractual ramifications. American had no recourse as long as the independent airlines did not use the fuel to violate the conditions of the sales.

The independent airlines in this case, Chautauqua and Trans-States, exercised complete dominion and control over the fuel from the time of purchase. They agreed to purchase the fuel subject to the conditions, but by agreeing to the exchange they did not give up their control over the fuel's use. They knowingly subjected themselves to the conditions from the outset and made all decisions about the fuel's use after the purchase took place.

II. The Contracts are Clear That American Intended the Independent Airlines to Hold Title and Ownership of the Fuel Used for AmericanConnection Flights – Responding to Appellant's Sole Point.

The intent of the parties is key for evaluating transfers of title and ownership. *Ovid Bell Press, Inc. v. Dir. of Revenue*, 45 S.W.3d 880, 885 (Mo. banc 2001), *citing Kurtz Concrete, Inc. v. Spradling*, 560 S.W.2d 858, 861 (Mo. banc 1978). The circumstances of the exchange, the facts of the case, and the industry custom are relevant to determining intent. *Id.* The interactions between American and the independent airlines show that the independent airlines were intended to hold title and ownership of the fuel.

The Contracts between each of the independent airlines and American remained functionally the same before and after the parties entered into the fuel provision contracts in 2004. Multiple provisions of the original Contracts indicate that American never intended to hold title or ownership of the fuel used in the AmericanConnection flights prior to the commencement of this suit. With no amendments to the Contracts, American could not have held title and ownership of the fuel in 2004 when it did not have title and ownership prior to the 2004 fuel contract.

A. American contractually disclaimed any responsibility for providing and overseeing fuel services.

Under Missouri law, where the contents of a contract are not ambiguous the intent of the parties is determined by the four corners of the contract. *Fall Creek Const. Co., Inc. v. Dir. of Revenue*, 109 S.W.3d 165, 170 (Mo. banc 2003). The contracts between the independent airlines and American clearly dictate the relationship between the parties and are indicative of the parties' intent that the independent airlines hold title and ownership of the fuel. The Contracts place all responsibility for fueling and fuel services on Chautauqua and Trans-States. American had no obligation or authority to provide, oversee or manage the fuel.

1. American made no modifications to the Contracts when they began providing fuel in 2004, and therefore retained no ownership or title to the fuel.

American disclaimed any contractual liability for fuel provision from the outset of the Contracts in 2001 and 2002. As none of these provisions changed after American began providing the independent airlines with fuel in 2004, American's right to the fuel remained the same. Three provisions in the Contracts are relevant. First, the contracts place all responsibility for fueling the planes on the independent airlines. The relevant provision reads as follows:

> Contractor [Chautauqua or Trans-States] will be solely responsible for, and American Airlines will have no obligations or duties with respect to, the dispatch of Contractors' flights. For the purposes of this Section, the term "flight dispatch" will include…fueling and flight release.

LF 97, 259 (emphasis added). American did not have to provide fuel for the AmericanConnection flights. Furthermore, the independent airlines could have purchased any fuel they chose without violating the Contracts. If the independent airlines could have purchased cheaper fuel from another

supplier, undoubtedly they would have done so. American had no oversight right and no control over the eventual disposition of the fuel.

Second, American was under no obligation to pay for or to provide fuel services under the contract. Indeed, American was only obligated to reimburse the independent airlines for fuel that cost specific amounts above a certain price and was used in the course of specific events. LF 143, 304. The contracts provide that: "At all covered locations, American Airlines, at its sole cost, shall provide Contractor with all Airport Support Services, and facilities, with the exception of the following:…(4) fuel services, to include into plane services." LF 98, 259-260 (emphasis added). As the independent airlines had the responsibility to pay for the fuel, they held title and ownership of the fuel. They had control over how the fuel was used, how the fuel was put into the planes, and how much they paid for the fuel.

Finally, the contracts provided for a situation in which American decided to place a bid on the provision of "Airport Support Services," which included fuel provision. The Contracts specified:

> At covered locations where an American Airlines Entity has the capability to provide the above excluded equipment and Airport Support Services, Contractor agrees to allow American Airlines to bid

on those items, and will use American Airlines if competitively priced.

Id. (emphasis added). This provision addresses the relationship between American and the independent airlines in this situation. American bid on the job of fueling the planes, and won the job because it provided the independent airlines with the most competitive price – a classic version of a sale and business transaction. In no way did being awarded a separate fuel provision contract grant American title to or ownership of the fuel.

2. American's reliance on *Olin* is misplaced.

The distinctions between the fuel provision clauses in the Contracts and the contract in *Olin* demonstrate the irrelevance of the *Olin* holding to this case. The Court's decision in *Olin* is premised on a transfer of title directly from the seller of the goods to the government. *Olin Corp.*, 945 S.W.2d at 444. Olin Corp. served only as the intermediary handling agent, which the contract between Olin Corp. and the government specifically noted. *Id.*

Unlike the situation in *Olin*, the Contracts between the independent airlines and American allowed for outside contracts between the independent airlines and third party providers. The Contracts provided that "in the event that American Airlines requests that Contractor [Chautauqua or Trans-

States] utilize third party vendors to provide Airport Support Services not excluded above, Contractor shall directly enter into agreements with such vendors." LF 98, 180-181. The Contracts permitted the independent airlines to separately contract for fuel services. And they actually exercised this right by hiring independent fuel providers before American began supplying them with fuel in 2004. Similarly, the 2004 fuel provision contracts functioned as outside sales contracts between the independent airlines and American. The degree of control exerted by the independent airlines over the fuel was much greater than Olin Corp.'s control.

The contract in *Olin* also included "detailed and comprehensive provisions on the acquisition, storage, consumption, utilization, maintenance and disposition of the property…the government had absolute discretion in the utilization of the purchased property, including how, where and when the property was to be used." *Olin Corp.*, 945 S.W.2d at 444. None of these detailed provisions existed in the airline Contracts in this case. The oral contracts provided only that the independent airlines could use the fuel solely for AmericanConnection flights. LF 23, 27, 94, 255, 291. The oral contracts provided no storage or maintenance provisions in relation to the fuel. *Id.* The contracts also failed to specify restrictions based on reasonable use or efficiency standards in relation to the fuel. *Id.*

American's degree of control over ticketing and signage is irrelevant to the question of ownership of the fuel. The fuel being used in the AmericanConnection flights was a fungible good, unlike the other goods and services in the Contracts. If the independent airlines chose not to purchase the fuel from American Airlines, they could get equivalent fuel from another source. LF 7. American's control over other elements of the AmericanConnection ticketing and route planning did not have any impact on the independent airlines' right to control the means by which the fuel was utilized on those flights.

The independent airlines also made an initial financial investment in the fuel that the independent airlines did not have to make in any of the other AmericanConnection services being provided by American. This makes the exchanges fundamentally different from the other processes. The ownership and title rights to the fuel should be judged independently of the rest of the provisions in the Contracts. *See Central Cooling & Supply Co. v. Dir. of Revenue*, 648 S.W.2d 546, 548 (Mo. 1982) (holding that sales between parent and subsidiary corporations were subject to sales tax due to organization as separate corporate entities).

Under the Contracts, American could not specify "how, where and when the property was to be used." *Olin Corp.*, 945 S.W.2d at 444. American's control over flight paths did not give them control over fuel that

could be moved into and out of planes and used in the process of moving the planes for maintenance and inspections. American's only right was to decide which planes to fuel and how much fuel to put into the planes. Once American made those decisions, the exclusive owners of the fuel were the independent airlines.

B. The Contracts allocated the cost of the fuel to American, and American did not reimburse the independent airlines for the fuel in order to retain ownership.

In its findings of facts, the Commission stated that American and the independent airlines were both "liable for only [their] own acts…and taxes although the costs of certain liabilities were reimbursable." LF 4. This finding emphasizes that while American paid for a percentage of the fuel used for the AmericanConnection flights, the payment was part of a cost allocation provision and not a purchase agreement. Furthermore, the Contracts only allocated fuel costs to American where the fuel was used in the course of flight block hours. *Id*. Under the oral agreements, not all of the fuel had to be used in the course of block hours. LF 23, 27. American could not retain ownership of fuel paid for solely by the independent airlines, nor could they predict from the outset of the sale what percentage of the fuel would be allocated to AmericanConnection flights.

1. American paid for the fuel as a "pass through cost."

The Contracts provided for fuel reimbursement not as a fuel ownership provision, but to allocate costs between the contracting parties. The repayment provision exists in the Contracts under the heading "Pass Through Costs." LF 143, 304. Just as American did not obtain title or ownership of the in-flight meals provided on AmericanConnection flights as a result of compensating the independent airlines for the cost of the meals as a "Pass Through Cost," American did not obtain ownership rights to the fuel by reimbursing the independent airlines.

American's claim that by paying for the fuel they retained title and ownership ignores the terms of the Contracts as well as the fuel sales contracts. American reimbursed the independent airlines for fuel used in the course of block hours from the outset of the AmericanConnection arrangements. LF 143, 304. This provision allocated the risk of changing fuel prices to American rather than the smaller independent airlines less capable of bearing that risk. American had no interest in owning or controlling the fuel prior to 2004 when they began providing the fuel. The only interest American had in the fuel as of 2004 was an interest in retaining title to the fuel to avoid having to pay taxes on fuel sales. This new

ownership interest, however, did not grant American title and ownership of the fuel where they had no ownership rights prior to 2004.

While the Contracts allocated the risk of changing fuel prices to American, the independent airlines bore the risk of loss of the fuel. The independent airlines only received reimbursement from American for "the actual number of Jet A fuel gallons consumed by Contractor's Independent Air Service Flights." LF 143, 304. The reimbursement did not depend on the number of gallons of fuel American sold to the independent airlines. For example, American Airlines would not have to reimburse the independent airlines for fuel that was deposited into the planes and subsequently used inefficiently or negligently lost. Any loss of the fuel prior to expenditure in the course of a flight required the independent airlines to pay for the loss. Unless the independent airlines held title to and ownership of the fuel, there was no reason for them to accept or be assigned this risk under the Contracts.

2. American did not compensate the independent airlines for all fuel sold.

American did not compensate the independent airlines for all of the fuel provided under the oral contracts. American only compensated for fuel used in the course of "independent air service flights." LF 143, 304. "Independent air service flights" are defined as:

> [S]cheduled air transportation using the AA code, and operated by the Contractor as AmericanConnection or comparable AA fully branded flights under a non-exclusive license to use the AA Marks in connection with such transportation.

LF 88, 171. Independent air service flights are distinguished from "ground handling duties" which includes maintenance and flight preparation duties. *Id*. Under the terms of the Contracts, American did not have to compensate the independent airlines for fuel used in the course of ground handling duties. LF 88, 180-181.

American did not compensate the independent airlines for all of the fuel being sold under the terms of the oral contracts. Performing ground services did not violate the sales conditions and the independent airlines could use the fuel for that purpose without American compensating the independent airlines. Certainly, if American did not pay for the fuel it could not have held title and ownership of the fuel once the independent airlines paid American for the product.

The independent airlines' fuel payments afforded the airlines a right of ownership that they would not have had without the payment-repayment system. The independent airlines bore the entire cost of the fuel for approximately a month prior to receiving reimbursement. LF 143, 304.

During this period of time, they had full dominion and control of the fuel by virtue of having paid for the product. Even if this exclusive dominion only arose for a short period of time, it was sufficient to make the sale subject to taxation. *R & M Enterprises, Inc. v. Dir. of Revenue*, 748 S.W.2d 171, 172 (Mo. banc 1988) (overruled on other grounds). The duration of the dominion and control is irrelevant for taxation purposes as long as there is a passage of title or ownership. *Buchholz Mortuaries, Inc. v. Dir. of Revenue*, 113 S.W.3d 192, 194 (Mo. banc 2003).

Furthermore, the independent airlines' control over the fuel existed independent of American. Had American become insolvent at some point prior to compensating the independent airlines for the fuel, they would have retained full rights to the fuel as they had purchased the product. American would not have been able to repossess the fuel. American also would not have been able to consider the fuel when accounting for their assets. The right to retain ownership independent of American indicates that the independent airlines exerted dominion and control over the fuel.

American did not compensate the independent airlines for all fuel sold under the oral contracts. Additionally, American had no way to know from the outset of the fuel sale how much of the fuel would be used in the course of an air service flight rather than in ground handling duties. The lack of

control by American and lack of total reimbursement is indicative of the independent airlines' title and possession of the fuel.

CONCLUSION

For the foregoing reasons, the Administrative Hearing Commission's decision should be affirmed.

Respectfully submitted,

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CERTIFICATION OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was filed electronically via Missouri CaseNet, and served electronically, on August 6, 2012, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 6,319 words.

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